82-1406

In the Supreme Court of the United States

October Term, 1983

George W. Lukovsky &
Elizabeth L. Lukovsky

Petitioner,

V.

Commissioner of Internal Revenue
Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Eighth Circuit

George W. Lukovsky
Petitioner Pro se
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QUESTION PRESENTED

1. Whether the petitioner can be compelled to produce evidence against themselves, in either federal or state, civil or criminal proceedings, which could be used against them in a federal or state prosecution, after they have properly claimed protection against self-incrimination under the Fifth Amendment to the United States Constitution?

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OPINION BELOW

1. The opinion for the Court of Appeals for the Eighth Circuit Court appears in the appendix hereto. The U.S. Tax Court entered no opinion its order of dismissal and decision appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was submitted October 28, 1982 and filed November 5, 1982. A timely petition for rehearing en banc was denied on November 30, 1982 and this petition for certiorari was filed within ninety days of that date. The court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Constitution, Amendment 4, Unreasonable searches and seizures shall not be violated . . . particularly describing the place to be search, and the person or things to be seized.

U.S. Constitution, Amendment 5, Nor shall any person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 6, The accused shall enjoy the right to speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

U.S. Constitution, Amendment 7, Where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

U.S. Constitution, Amendment 9, The numeration in the constitution, of

certain rights, shall not be construte to deny or desparage others retained by the people.

U.S. Constitution, Amendment 14, No state shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment 14, Section 3 Having previously taken an oath, as member of congress, or as officer of the United States, or as a member of any State Legislature or as an executive of judicial officer of any State to support the constitution of the United States . . .

Title 18 U.S.C. Section 6004. The IRS has the authority to confirm immunity on the tax payer and then compell the production of financial information.

Title 42 Section 1983. Provides that every person who under color of law has deprived anyone of any rights, privileges, or immunity secured him by the constitution or laws shall be liable to the party injured in civil action at law, equity, or other proper proceedures for redress.

Title 28 U.S.C. Section 1343 (3). provides for equal rights of citizens or of all persons within the jurisdiction of the U.S.

Title 42 U.S.C. Section 1985 (3). restraints private action, prohibits combination of conspiracy to deprive a person of civil rights, provide for recovery of damages. Section 1 of 1983 restraints state action.

Title 42 U.S.C. Section 1985 & 86. Injured by conspiracy to deprive them of any federally guaranteed right or privileges while 1986 need only show had in his power to prevent the injury and neglect to do so similar to 1983 section.

Title 28 Code U.S.C. Section 1331, 2201, and Title 42 U.S.C. Section. Also rise under the civil rights laws of the United States.

18 U.S.C. Section 241. If two or more persons conspire to injure, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured him by the constitution of the United States or because of his having exercised will be fined not more than $10.000 or imprisioned not more than 10 years or both.

STATEMENT OF THE CASE

Taxpayers were summoned on October 15, 1981 to provide financial information regarding the tax years for 1976, 1977, 1978&1979. The taxpayers were unable to provide information requested for review. Taxpayer at the time claimed the privilege against self-incrimination bases on the Fifth Amendment to the constitution but not limited to it. Petitioners received two different notices of deficiency at various times of which the first was undated. The second notice arrived 30-60 days after the date shown on the notice of deficiency. Petitioner tried many times to communicate with the Tax Court Clerk in Washington, D.C. but at no time was there any response until after seeking congressional assistance. The petitioners chose to forego the IRS appeal system and went directly to the Tax Court in St. Paul. Motioned for dismissal and decision was made on April 15, 1982. Less than a year passed from date of petitioners response to notice of deficiency to the U.S. Tax Court dismissal. Timely appeal was made to the U.S. Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals opinion was filed

on November 15, 1982 in which they affirmed the Tax Courts dismissal for alleged lack of prosecution. Appellants timely Petition for rehearing and rehearing en banc were denied November 30, 1982.

We believe the increase in federal income taxes that respondent alleges to be due by petitioners were based on part of petitioner's records. The imcomplete records were seized by the state tax auditor after petitioners claimed the privilege againset self-incromination, to specific questions, based on the fifth and fourteenth amendments. Part of the incomplete records were then returned by the State Tax Auditor three monts later, who said that "We will screw you up good" after petitioners further declined to answer specific questions and relied on their fifth amendment and fourteenth amendment protection against self-incrimination. Petitioners have always paid their fair share of taxes. The respondent later requested a copy from the petitioners of the state tax auditor determination which was based on petitioners incomplete records. Petitioners again declined to answer specific questions and relied on their fifth amendment and fourteenth amendment protection against self-incrimination. All letters from attorney for respondent, appeals officer, were to arrange for

hearing outside the Tax Court at his office. We had already appealed to the Tax Court. (see Appendix).* The amount respondent now alleges to be owed by petitioners is $7,451.71. We are unaware of how this figure was arrived at or have no knowledge of how this figure was computed. The petitioners have always paid their fair share of taxes.

(*See appendix page 29)

REASONS FOR GRANTING THE WRIT

I. PETITIONER HAS A RIGHT TO A GRANT OF IMMUNITY BEFORE BEING COMPELLED, OR PENALIZED FOR REFUSING TO PRODUCE POTENTIALLY INCRIMINATING INFORMATION AGAINST HIMSELF. SANCTIONS OR PENALTIES TO COMPELL SELF-INCRIMINATION STATEMENTS OR INFORMATION WHICH HAS NOT BEEN IMMUNIZED IS NOT PERMITTED BY LAW. THE PETITIONERS REASONS ARE FOUNDED UPON BUT NOT LIMITED TO THE FOLLOWING CASES:

Garrity vs. New Jersey, 385 US 493. In this case police officers were accused of fixing traffic tickets. They were subjected to questioning without a grant of immunity and were told that if they refused to answer, state law provided that they were subject to removal from their jobs. They answered the questions out of fear of losing their jobs and were then convicted on their testimony. The Supreme Court reversed the convictions, saying:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves . . . a choice between the rock and the whirlpool . . . .

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

Gardner vs. Broderick, 392 US 273. In case a police officer was subpoenaed by and appeared before a grand jury which was investigating alleged bribery and corruption of

police officers, and was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination, but was asked to sign a "waiver of Immunity" after being told that he would be fired if he did not sign. He refused to sign the waiver and refused to testify, and was fired.

In Spevack vs. Klein, 378 US 511, the court overturned the disbarment of an attorney who exercised right against self-incrimination in a hearing to dicipline.

Malloy vs. Hogan, 378 US 1:

The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to SUFFER NO PENALTY (emphasis added), as held in Twining, for such silence.

It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendent in a criminal prosecution . . .

Blackburn vs. Alabama, 361 US 199:

This court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only

hallmark of unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that efficiency of the rack and the thumb screw can be matched, given the proper subject, by more sophisticated modes of persuasion.

It should be obvious to any thinking person that the threat of a substantial and very excessive arbitrary tax assesment in many cases would constitute greater compulsion to answer questions than the threat of a physical beating or other forms of torture.

Boyd vs. US 116 US 616:

. . . any COMPULSORY (emphasis added) discovery be extorting the party's oath, or COMPELLING (emphasis added) the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the instincts of an Englishman: it is abhorrent to the instincts of an American. It may suit the purpose of despotic power: but it cannot abide the pure atmosphere of political liberty and personal freedom.

In appeal the Supreme Court said:

Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled tes-

timony or its fruits in connection with a criminal prosecution against the person testifying.

In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioners's testimony was demanded before the grand jury in part so that is might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

By the same token, Internal Revenue Service would have not need to seek to compel potentionally incriminating information from a tax-payer without granting immunity unless they desire to preserve the information for prosecutorial purposes.

Lefkowitz vs. Turley, 414 US 70. In this case licensed arthitects holding contracts with the state refused to waive immunity

and refused to testify before a grand jury investigating various criminal charges. As a penalty, provided by state statute, all their current contracts were canceled, and they were precluded from holding state contracts for five years. On appeal the court said:

A waiver secured under threat of substantial economic sanction cannot be termed voluntary.

As Garrity succinctly put it: The option to lose their means of livelihood or to pay for penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.

The plaintiffs disqualification from public contracting or five years as penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights.

Lefkowitz vs. Cunningham, 431 US 801. Citing some of the cases mentioned above the Supreme Court said:

These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.

We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need.

Raphal vs. Conrad, 371 F Supp 256: "Economic santions may not constitutionally be used to coerince waiver of Fifth Amendment privilege."

II. PETITIONERS FEAR OF INCRIMINATION IS SUBSTANTIAL AND REAL AND IS ENTITLED TO EQUAL PROTECTION OF THE LAW.

Marchetti vs. United States, 390 U.S. 39: "The Constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted..."

Slochower vs. Board of Education, 350 U.S. 551: "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury...The privilege serves to protect the innocent WHO OTHERWISE MIGHT BE ENSNARED BY AMBIGUOUS CIRCUMSTANCES (emphasis added)."

Twining vs. New Jersey, 211 U.S. 78: "It was generally regarded then as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions."

United States vs. Neff, 615 F.2d 1235 (1980): "The information that would be revealed by direct answer need not be such as would itself support a criminal conviction, however, but must simply 'furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.'" (Innocent people are often prosecuted.)

"This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him" 'prove guilt to avoid admitting it.'"

Hoffman vs. United States, 341 U.S. 479: "The claimant is not required to prove the precise danger since by so doing he would 'be forced to disclose those very facts which the privilege protects.' Finally to sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerour because injurious disclosure could result."

Isaacs vs. United States, 256F.2d 654: "To warrant a denial of the privilege it must appear in the setting in which the question is asked that the answer cannot possibly have a tendency to incriminate."

United States vs. Coffey, 198 F.2d 440: "Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry."

In the Brooklyn Law Review, 41: 580 at 581, it is pointed out that: "With the advent of computer technology and the reality of governmental and private industry data banks, the possibility of self-incrimination by reason of information provided in a regulatory context is real and largely unchecked.

"As a matter of course, citizens record and report personal information in a variety of regulatory contexts. They do so. . . in order to qualify for many kinds of government assistance, including governmentally insured mortgages, education loans, health insurance benefits, and social security."

Additions to the list should include welfare and unemployment benefits, mortgage assistance payments, education grants, federal old age survivors and disability insurance benefits, etc.

U.S.C. Title 18 Section 1001 provides a very serious criminal penalty for anyone who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any

false, fictitious or fraudulent statement or entry . . .

Without revealing the precise danger of self-incrimination which Petitioner fears, because to do so might supply a link or lead necessary to obtain information sufficient to get him prosecuted.

The price for invoking the right against self-incrimination Petitioner cannot lawfully have arbitrary assessments, sanctions, and penalties imposed upon him, absent a grant of immunity.

We do not consider the aim of the IRS, in its statutory demand for financial information from Petitioner-ostensibly for the strictly neutral purpose of collecting taxes -to be strictly neutral. The information demands if supplied, could be used as evidence against Petitioner in a prosecution for a non-tax crime absent a grant of immunity. If the only object of the IRS, in demanding financial information from Petitioner, is to collect taxes, than surely the IRS would have no need to refuse to grant immunity to Petitioner is exchange for the financial information they seek from Petitioner, such would give great weight to the arguement that the IRS interest in the in-

formation is not neutral but heavily weighted in favor of prosecutorial interests.

When the financial information demanded of taxpayers for income tax collecting purposes is made available to prosecutors in prosecutions for non-tax crimes, to argue that a taxpayer's fear of self-incrimination is not real and substantial, is to argue a legal fiction.

Petitioner fears possible prosecution for a non-tax crime which could be established, in part, from financial information Petitioner would have to produce in order to disprove the Commissioners determination of deficiency.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that this court should issue a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review its decision.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEAL

FOR THE EIGHTH CIRCUIT

No. 82-1655

George W. and Elizabeth L. Lukovsky,

Appellants,

v.

Commissioner of Internal Revenue,

Appellees

Appeal from the United States Tax Court

Submitted: October 28, 1982

Filed: November 5, 1982

Before Heaney and Bright, Circuit Judges; and HENLEY, Senior Circuit Judge.

PER CURIAM.

Taxpayers George and Elizabeth Lukovsky appeal from the tax court's dismissal for lack of prosecution of their petition contesting an income tax deficiency assessment. At issue is whether the Lukovskys are entitled to use their fifth amendment privilege against self-incrimination to avoid substantiating the deductions they have claimed on their tax return. We affirm the tax court's dismissal.

On January 9, 1981, the IRS sent a notice of deficiency to the Lukovskys informing them that they owed an additional $4,814.50 in income tax for the tax year ending December 31, 1977. The deficiency resulted from the IRS's disallowance of the number of business deductions that the Lukovskys were unable or unwilling to substantiate. The Lukovskys petitioned to contest the deficiency on April 23, 1981.

At a hearing before the tax court on March 22, 1982, the Commissioner filed a motion to dismiss the action for failure to prosecute. The motion

cited the Lukovskys' failure to attend scheduled pretrial conferences on September 9 and October 23, 1981; their failure to attend a stipulation of facts conference set for February 4, 1981; and their failure to produce any evidence substantiating the contested deductions. At the hearing, the Lukovskys admitted that they had not furnished the IRS with any of the requested information, but they argued that the fifth amendment privilege against self-incrimination protected them. The tax court granted the IRS's motion to dismiss, reasoning that the absence of a pending or threatened criminal prosecution militated against the Lukovskys' invoking the fifth amendment to avoid furnishing information to the IRS. The Lukovskys appealed.

The tax court has repeatedly held that "(t)he privilege against self-incrimination does not apply where the possibility of criminal prosecution is remote or unlikely." Roberts vs. Commissioner, 62 T.C. 834, 838, (1974). The fifth amendment may not be used as

a subterfuge to avoid paying taxes. See, e.g., Edwards vs. Commissioner, 680 F. 2d 1268, 1270 (9th Cir. 1982).

This court has reached a similar result in cases in which tax protestors have attempted to use the fifth amendment to justify their refusal to file a tax return. In United States vs. Civella, 666 F. 2d 1122, 1126 n.2 (8th Cir. 1981), this court commented that "(t)he fact that a completed return would incriminate a taxpayer does not relieve him of his duty to file under (26 U.S.C.) S 7203. At a minimum he must assert his fifth amendment right against self-incrimination as to specific items of requested information on the tax return * * *."

The Lukovskys' attempt to use the fifth amendment to contest the IRS' deficiency assessment is subject to these same strictures. The privilege is available to protect them from real dangers of self-incrimination, not to avoid answering questions altogether.

The Lukovskys have failed to prove the legitimacy of their deductions.

Moreover, they have not shown any reason for refusing to come forward with evidence to prove the legitimacy of their deductions. Thus, the tax court correctly dismissed the Lukovskys petition for lack of prosecution.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
82-1655
September Term, 1981
George W. and Elizabeth
L. Lukovsky
vs.
Commissioner of Internal
Revenue
Respondent
Application for Stay Pending Appeal

Petitioners' pro se Application for Stay Pending Appeals, having been considered by the Court, is hereby denied.

June 7, 1982

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
82-1655
September Term, 1981
George W. and Elizabeth
L. Lukovsky

vs.

Commissioner of Internal
Revenue
Respondent
Application for Stay Pending
Appeal

Motion for leave to amend petition due to second notice of deficiency and motion for order requiring respondent to answer written interrogatories is denied.

June 7, 1982

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1655

September Term, 1982

George W. and Elizabeth L. Lukovsky,

Appellants,

vs.

Commissioner of Internal Revenue,

Appellees

Appeal from the United States Tax Court

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestion for rehearing en banc denied.

November 30, 1982

UNITED STATES TAX COURT
Washington, D.C. 20217

GEORGE W. LUKOVSKY AND
ELIZABETH LUKOVSKY
Petitioner

v.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent,

Docket No. 8918-81

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the Trial Session of the Court at St. Paul, Minnesota, on March 22, 1982. Counsel for respondent appeared as did petitioner. Counsel for respondent filed with the Court a motion to dismiss for lack of prosecution. This case was recalled on March 22, 1982, for hearing a respondent's motion. Both parties were heard on the motion. The Court directed Counsel for respondent to file with the Court a complete copy of the Notice of Deficiency dated January 9, 1981 which was mailed to petitioners. Counsel for respondent filed with the Court on March 23, 1982 a complete copy of said Notice of Deficiency.

Upon due consideration and for reasons appearing in the transcript of the proceedings, it is

ORDERED that respondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioners for the Taxable year 1977 in the amount of $4,814.50.

(Signed) Meade Whitaker
Judge

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

GEORGE W. LUKOVSKY AND
ELIZABETH L. LUKOVSKY

Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE.

Docket No. 4772-82

Respondent

ORDER

The respondent on April 27, 1982; filed a motion to dismiss for lack of jurisdiction in this case. A copy of that motion (has been) served.

Premises considered, it is

ORDERED that petitioner may on or before June 7, 1982, file with the Court on objection to respondent's motion, setting forth therein the ground of objection. The Court will thereupon take such further action as it deems appropriate.

(Signed) Theodore
Tannenwald Jr.
Chief Judge

APPEAL RIGHTS AND PREPARATION OF PROTESTS FOR UNAGREED CASES. Department of the Treasury Internal Revenue Service Publication 5 (Rev. 9-79)

Appeals To The Courts: If you and the Service disagree after your hearing, or if you skipped our appeals system, you may take your case to the United States Tax Court, the United States Court of, Claims, or your United States District Court.
(However, if you are a non resident alien taxpayer, you cannon take your case to a United States District Court.) These courts are independent judicial bodies and have no connection with the Internal Revenue Service.

Tax Court: If your case involves a disagreement over whether you owe additional income tax, estate or gift tax, or certain excise taxes of private foundations, public charties, and qualified pension plans, you may go to the United States Tax Court. To do

this, ask the Service to issue a formal letter, called a notice of deficiency. You have 90 days from the date this notice is mailed to you to file a petition with the Tax Court (150 days if addressed to you outside the United States). If you do not file the petition within the 90-day period (or 150 days as the case may be), the law requires that we assess and bill you for the deficiency.

The Court will schedule your case for trial at a location convenient to you. You may represent yourself before the Tax Court, or you may be represented by anyone admitted to practice before that Court.

If you dispute not more than $5,000 for any one tax year, there are simplified procedures. You can get information about these procedures and other matters relating to the Court from the Clerk of the Tax Court, 400 Second St. N.W., Washington, D.C. 20217

No. 82-1406

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE W. LUKOVSKY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1406

GEORGE W. LUKOVSKY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the decision below upholding the Tax Court's dismissal of their petition for failure to prosecute.

The relevant facts may be summarized as follows: On January 9, 1981, the Commissioner of Internal Revenue sent petitioners a statutory notice of deficiency, determining that they owed an additional $4,814.50 in federal income taxes for 1977. The deficiency resulted from the Commissioner's disallowance of certain business deductions petitioners had claimed on their return but were unable or unwilling to substantiate. On April 23, 1981, petitioners filed a petition in the Tax Court contesting the deficiency determined by the Commissioner (Pet. App. 19).

At a hearing before the Tax Court on March 22, 1982, the Commissioner filed a motion to dismiss petitioners' case for failure to properly to prosecute. The Commissioner cited

petitioners' failure to attend scheduled pre-trial conferences, their failure to attend a conference to stipulate to facts not reasonably in dispute, and their failure to produce any evidence substantiating the deductions they claimed. At the hearing, petitioners failed to introduce any evidence to support their deductions and instead argued that the Fifth Amendment privilege against compulsory self-incrimination justified their action (Pet. App. 20).

The Tax Court granted the Commissioner's motion to dismiss, reasoning that since there was no pending or threatened criminal prosecution against petitioners, the Fifth Amendment did not support their failure to produce evidence in support of their deductions (Pet. App. 20). The court of appeals affirmed (Pet App. 18-22). It held that the privilege against self-incrimination does not apply where, as here, the possibility of criminal prosecution is remote or unlikely. Since petitioners failed to prove that their deductions were proper, the court concluded that the Tax Court correctly dismissed their petition for failure to prosecute (Pet. App. 20-22).

1. It has long been settled that a deficiency in federal taxes determined by the Commissioner is presumptively correct and that the taxpayer has the burden of proof in the Tax Court. *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); Tax Ct. R. 142(a) (May 1, 1979). To meet that burden, it was therefore incumbent on petitioners to introduce evidence to substantiate their claimed business deductions. Petitioners acknowledge that they failed to come forward with any such evidence. Thus, the Tax Court had no choice but to dismiss their suit for lack of prosecution.[1]

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[1]The Tax Court's dismissal order is further supported by petitioners' failure to stipulate to facts not reasonably in dispute. Tax Ct. R. 91(a) (May 1, 1979) requires the parties to stipulate to facts to the extent

Petitioners contend (Pet. 8-17) that the Fifth Amendment privilege against compelled self-incrimination insulates them from the dismissal of their lawsuit. However, a bald claim of Fifth Amendment privilege, such as petitioners have made here, cannot be used by a party to meet the burden of proof in a civil proceeding that he has instituted. The Fifth Amendment may be used only as a "shield," not as a "sword." See *United States* v. *Carlson*, 617 F.2d 518 (9th Cir.), cert. denied, 449 U.S. 1010 (1980); *Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969); *Edwards* v. *Commissioner*, 680 F.2d 1268 (9th Cir. 1982); *McCoy* v. *Commissioner*, 696 F.2d 1234 (9th Cir. 1983); *Urban* v. *United States*, 445 F.2d 641, 643 (5th Cir. 1971), cert. denied, 404 U.S. 1015 (1972). As the court stated in *Edwards, supra*, 680 F.2d at 1270:

> [Appellants'] fifth amendment claim merely rests on a generalized fear that if forced to turn over their business records, they somehow would be more likely to have criminal charges brought against them for tax evasion. Because there is no indication that production of their records would reveal criminal activity in their auto repair business and because the fifth amendment privilege may not itself be used as a method of evading payment of lawful taxes, * * * we reject appellants' fifth amendment claim as frivolous.

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agreement on them can or fairly should be reached. Petitioners, however, failed to appear at a stipulation conference scheduled with the Commissioner's counsel. Since the stipulation process has been described as the "mainstay" or "bedrock" of practice before the Tax Court (note to Rule 91(a), as set out in *Branerton Corp.* v. *Commissioner*, 61 T.C. 691, 692 (1974)), petitioners' failure to make any effort to stipulate to facts not reasonably in dispute was itself sufficient justification for the dismissal of their Tax Court petition. *Miller* v. *Commissioner*, 654 F.2d 519, 521 (8th Cir. 1981); see also *Amato* v. *Commissioner*, 47 T.C.M. (P-H) 1199 (1977).

Thus, the Fifth Amendment privilege is ineffective as a substitute for proof in a civil tax proceeding, such as the present one, where the possibility of future criminal prosecution is speculative or remote. *Edwards* v. *Commissioner, supra; United States* v. *Neff*, 615 F.2d 1235 (9th Cir.), cert. denied, 447 U.S. 925 (1980); *Ryan* v. *Commissioner*, 67 T.C. 212, 217 (1976). As the court of appeals correctly concluded here (Pet. App. 21), "the privilege is available to protect * * * [petitioners] from real dangers of self-incrimination, not to avoid answering questions altogether."

Moreover, petitioners had no genuine basis to fear that producing evidence to support their business deductions could lead to criminal prosecution. They were advised by the Commissioner that, so far as could be determined, they were not the subject of any criminal investigation (C.R. 8 at 7; C.R. 10).[2] It is implausible that evidence supporting petitioners' deductions, even assuming it exists, could simultaneously tend to incriminate them. While the claimant need not incriminate himself in order to invoke the privilege, if the circumstances appear innocuous, he must make some positive disclosure indicating where the danger lies. *McCoy* v. *Commissioner, supra*, 696 F.2d at 1236. Petitioners have not done so here.[3]

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[2]"C.R." references are to the numbered documents contained in the original record on appeal, as numbered by the Clerk of the Tax Court and transmitted to the court of appeals.

[3]The cases petitioners cite are not in point. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), for example, all involve grand jury or other inquisitorial investigations of suspected criminal activities. The Fifth Amendment privilege was upheld in those cases because of the substantial risk of self-incrimination evident in such proceedings. Here, however, there is no

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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suspected criminal activity on petitioners' part, but merely the requirement that, like all taxpayers, they substantiate the deductions claimed on their income tax return.

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